IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 54 OF 2004

Shri Sukhalal Kumar,
major of age, 44 years,
resident of H.No.108/3,
Suluzin Cottages, Mungul,
Grande, Margao, Goa. ... Appellant

versus

1. Prakash B. Borkar,
age about 45 years,
son of Shri Bhagawant
Borkar, resident of
H. No.110, Ward No.6,
Navelim Road,
Margao, Salcete, Goa.

2. The State,
represented by its
Public Prosecutor. ... Respondents

Mr. J. F. Melo, Advocate for the Appellant.

Mr. G. Sirsat, Advocate for the Respondent No.1.

Ms. W. Coutinho, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 23RD AUGUST,2006.

J U D G M E N T

This is complainant's appeal by special leave, against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) by Order dated 27-7-2004 of the learned J.M.F.C., Margao.

2. The case of the complainant is that the complainant knows the accused for many years as the accused was doing business at Margao and that the accused on 5-7-2002 approached the complainant for a loan of Rs.2,00,000/- as the accused was in need of money and accordingly the complainant advanced a sum of Rs.2,00,000/- to the accused on 15-7-2002 and after the said amount was handed over the accused gave a cheque bearing No.CSS/C/575523 dated 11-10-2002 and when the complainant deposited the said cheque the same was returned with endorsement "Account Closed" whereupon the complainant sent a legal notice dated 25-10-2002 which the accused received and since the accused failed to comply with the same, the complainant filed the complaint and in support thereof, the complainant examined himself.

3. On the other hand, it was the case of the accused that the accused had lost the said cheque which was signed by the accused and which otherwise was blank on which the complainant put an amount of Rs.2,00,000/- and deposited the same in the Bank. It was also the case of the accused that he did not know the complainant and as the accused had lost the cheque book the accused had closed the said account. The accused examined himself and produced a copy of the intimation dated 14-8-2002 informing the Manager of United Bank of India about the loss of the said cheque book as well as a statement of his account which showed that he had closed the said account on 14-8-2002.

4. The learned J.M.F.C. in acquitting the accused observed that the complainant had failed to prove that the complainant had any relationship with the accused. The learned J.M.F.C. also noted that the cheque was written in an ink which was different from the ink the accused had signed. The learned J.M.F.C. also noted that the complainant had no capacity to lend Rs.2,00,000/- to the accused. The learned J.M.F.C. also noted that the complaint was barred by limitation.

5. Mr. J. F. Melo, the learned Counsel on behalf of the complainant has criticized the findings of the learned J.M.F.C., Margao. On the other hand, Mr. G. Sirsat, the learned Counsel on behalf of the accused has tried to support the reasoning of the learned J.M.F.C. at the same time conceding that the finding that the complaint was barred by limitation is otherwise not correct. Mr. Melo has submitted that the complainant was not required to show the relationship between the complainant and the accused and in this regard to support this submission Mr. Melo has relied on the case of **Goa Plast (P) Ltd.** v. **Chico Ursula D'Souza**((2004) 2 SCC 235) wherein the Supreme Court stated that Mr. Melo has further submitted that in the light of Section 118 of the Act it was not necessary that the complainant had to prove that he was a tax payer or to show his earning capacity because the complainant could have borrowed the money before it was lent to the accused. Mr. Melo has also submitted that the accused failed to prove as to how the cheque lost by the accused landed into the hands of the complainant and that there was nothing in the evidence of the accused to show that as to who had filled the said cheque although the accused had admitted that he had signed the same. Mr. Melo has also

submitted that the fact that the accused received a notice but did not reply to the same shows that the accused had no defence to advance and that the plea as regards the loss of the cheque was taken belatedly. Mr. Melo has placed reliance on the case of **Yogendra Bhagatram Sachdev** v. **State of Maharashtra**(2003 ALL MR(Cri) 639) wherein this Court observed that the failure to reply to the notice under Section 138 of the Act not being explained would raise a presumption that the accused had, in fact, no defence whatsoever.

6. As far as the aspect of limitation is concerned, in my view, the learned J.M.F.C. was wrong in concluding that the complaint was barred by limitation. The complainant had produced the statutory notice dated 25-10-2002 which the accused received. The date of the Postal Authority might have not been visible on the A.D. Card and the accused also might have not put the date below his signature on the said A.D. Card. Fifteen days period from 25-10-2002 would have expired on 9-11-2002 and thereafter the time for filing the complaint commenced from 10-11-2002 and the complaint could have been filed till 10-12-2002 and in fact it was filed on 4-12-2002 and

therefore it could not be said that the complaint was barred by limitation.

7. The learned J.M.F.C. has concluded that the evidence of the complainant and the accused produced on record showed that the complainant had failed to prove that the cheque was issued by the accused towards legally enforceable debt. As far as the signature on the subject cheque is concerned, there was no dispute about it because the accused even in his evidence had stated that the cheque which was signed by him was lost. However, the complainant had clearly stated that the accused had written the entire cheque and given it to him when he stated that the accused wrote all the things on the cheque. The cross-examination of the complainant as well as the accused has been very sketchy. It is true that it was suggested to the complainant that besides the signature the other things on the cheque were not written by the accused, a suggestion which the complainant denied. However, the accused in his evidence did not make any categorical statement to the effect that the remaining writings on the cheque i.e. to say the date, the name of the payee, the amount were not written by him. It is well settled that mere

suggestions do not have the value of evidence and in the absence of any positive statement having been made by the accused in his evidence that he had not written the other details of the cheque besides his signature, the learned J.M.F.C. was bound to accept the statement of the complainant that the cheque was filled in, in all respects by the accused and handed over to the complainant, as stated by him. The learned J.M.F.C. entirely lost sight of the fact that once the accused had given the cheque to the complainant it carried in favour of complainant several presumptions and in the light of the said presumptions, the complainant was not expected to prove either that he was a tax payer or had lending capacity and it was for the accused to rebut the said presumptions.

8. As stated by the Apex Court in the case of **Hiten P. Dalal** v. **Bratindranath Banerjee** (AIR 2001 SC 3897) the presumption available under Section 139 of the Act provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability and the effect of this presumption is to place

the evidential burden on the accused of proving that the cheque was not received by the complainant towards the discharge of any liability. The Supreme Court further held that both Sections 138 and 139 of the Act required that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn and that it introduced an exception to the general rule as to the burden of proof in criminal cases and shifted the onus on to the accused and such a presumption was a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduced evidence showing the reasonable possibility of the non existence of the presumed fact. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom

the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists. The Supreme Court further observed that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man. Earlier, the Supreme Court in the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another**((1999) 7 SCC 510) had observed that when the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can be legally inferred that the cheque was made or drawn for consideration on the date which the cheque bears. The Supreme Court had further held that Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability and the burden is on the accused to rebut the aforesaid presumption. The presumption

under Section 139 of the Act has the import of compulsion and the Court is required to presume, unless contrary is proved, that the holder of the cheque received it for discharge in whole or in part, of any debt or other liability. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists and that is the definition given for the word "proved" in the Evidence Act and what is required is the production of such materials on which the Court can reasonably act to reach the supposition that a fact exists. Proof of a fact depends upon a decree of probability of it having existed and the standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. In the case at hand, I have already concluded, based on the evidence of the complainant, that the cheque was delivered by the accused to him completed in all respects. There was nothing elicited in the cross-examination of the complainant or the accused as regards the change in ink in relation to the signature and the other handwritings on the cheque and therefore the learned J.M.F.C. was certainly not

required to go into that aspect with a view to disbelieve the complainant. Admittedly, the statutory notice dated 25-10-2002 was received by the accused but the accused chose not to reply to the same and this certainly can be taken as a circumstance in favour of the complainant and as against the accused. In case the accused had lost the subject cheque and the complainant has misused the same by writing an amount of Rs.2,00,000/-, the accused would have immediately reacted after the receipt of letter dated 25-10-2002 either by replying to it or by taking some other action against the complainant. This Court in the case of **Yogendra Bhagatram Sachdev** v. **State of Maharashtra and another**(supra) held that the failure to reply to the notice would raise a presumption that the accused had in fact no defence whatsoever. The case of the accused has not at all been consistent. The accused in answer to the first question in his statement under Section 313 of the Code of Criminal Procedure, 1973 stated that he did not know the complainant and he had never seen him. In fact, the complainant had stated that he knew the accused for many years as the accused was doing business in Margao and there was not even a denial to the said statement of the complainant. The accused stated in answer to

the second question that his cheque book was lost and again in a different tone, in answer to the third question, the accused stated that as the account was not being operated by him, he had closed the account and yet again in answer to the fourth question the accused stated that he did not comply with the notice because the amount was not due from him. In his evidence before the Court, the accused stated that the cheque which was signed by him was lost and he had intimated about the same to the Bank. The accused produced the intimation to the Bank dated 14-8-2002 and what can be seen therefrom is that the cheque book containing about 20 cheque forms was lost by the accused. Surprisingly, there is no mention therein that any of the cheques was signed by him. In further cross-examination, the accused stated that he had not told anyone that he was changing his residence. The question leading to that answer was probably asked to the accused because the accused had stated in his said intimation dated 14-8-2002 that he had shifted his residence. The accused further stated that he did not know how many cheque books he had used but admitted that he had used cheques when he had purchased "Done" and "Patravali", the business of which the accused was doing. The accused

further stated that he did not remember when he had issued the last cheque and further admitted that as per the statement of account produced by him the balance in his account was always around Rs.100/-. In further cross-examination the accused stated that he did not know how many cheques there were in one cheque book and further stated that although he had lost his cheque book he could not say how many cheques were lost by him and this inspite of the fact that in the said intimation dated 14-8-2002 the accused had mentioned the cheque numbers of the cheque book he had lost. The accused further stated that he could not recollect the cheque number of the cheque in the present case and admitted that besides informing the Bank to close the account and the loss of his cheque book he had not done anything else. As per the complainant, the sum of Rs.2,00,000/- was given to the accused on 5-7-2002 and the accused gave to the complainant the subject cheque on 11-10-2002. It is therefore obvious that the accused after taking money from the complainant closed the account and after the closure of the account gave the subject cheque to the complainant on 11-10-2002 with a view to cheat the complainant. The Apex Court in the case of **Goa Plast(P) Ltd.** v.

Chico Ursula D'Souza(supra) upheld the view held in **Modi Cements Ltd.** v. **Kuchil Kumar Nandi**((1998) 3 SCC 249) that once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the Bank for stoppage of payment it will no preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. The Supreme Court observed that the said view was in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date. The Apex Court further observed that the object and the ingredients particularly of Sections 138 and 139 of the Act could not be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends on the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even

merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the Bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a Civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee. It is now well settled that Section 138 of the Act is applicable even when a cheque is issued from an already closed account as held in **N. A. Issac** v. **Jeemon P.Abraham and another**(2005 ALL MR(Cri) 1519(SC).

9. In the case at hand, the accused had issued to the complainant the subject cheque filled in with all details. The complainant has been very consistent in his case while the accused has been inconsistent and wavering in his defence. The very intimation dated 14-8-2002 does not spell out that any of

the cheques were signed by the accused which otherwise the accused admitted in his evidence before the Court. It is also not clear as to whether the account was being closed either because the accused had shifted his residence or the accused had lost the cheque book containing 20 cheque forms or whether the pass book was lost. In case the cheque book was lost there was no necessity for the accused to have closed the account or for that matter if pass book was lost since it was always open for the accused to obtain a duplicate pass book or a fresh cheque book. From the cross-examination of the accused vis a vis the said intimation dated 14-8-2002 it is quite clear that the accused had taken the step of closing of the account with a view to avoid his liability towards the complainant. The accused had failed to prove that he had lost the said cheque and on the contrary, it is the evidence of the complainant which had to be accepted which was also reinforced by the presumption available to the complainant which the accused has failed to rebut, considering the facts of the case discussed hereinabove. The case of the accused does not at all appear to be probable. On the contrary, what appears probable is that the accused received the money from the complainant, then closed his account, and issued the

subject cheque to the complainant with a view to avoid his liability under Section 138 of the Act.

10. The appeal therefore deserves to succeed and the impugned Judgment/Order deserves to be set aside. Consequently, the accused is hereby convicted under Section 138 of the Negotiable Instruments Act, 1881. The accused is hereby sentenced to undergo S.I. of two months and to pay compensation of Rs. 2,35,000/- and in default to undergo six months S.I.

N. A. BRITTO, J.

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